

No. 11-1444

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL BROTHERHOOD OF)	On Petition for Review
TEAMSTERS; TEAMSTERS JOINT COUNCIL)	of Final Agency
NO. 7; TEAMSTERS JOINT COUNCIL NO. 42;)	Action of the Federal
PUBLIC CITIZEN; and SIERRA CLUB,)	Motor Carrier Safety
)	Administration
Petitioners,)	
)	
vs.)	
)	
UNITED STATES DEPARTMENT OF)	
TRANSPORTATION; FEDERAL MOTOR)	
CARRIER SAFETY ADMINISTRATION; RAY)	
LAHOOD, Secretary of the U.S. Department of)	
Transportation; ANNE S. FERRO, Administrator of)	
the Federal Motor Carrier Safety Administration;)	
and THE UNITED STATES,)	
)	
Respondents.)	
)	

PETITIONERS' OPENING BRIEF

STEPHEN P. BERZON
JONATHAN WEISSGLASS
BARBARA J. CHISHOLM
DIANA S. REDDY
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Tel.: (415) 421-7151

SCOTT L. NELSON
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
Tel.: (202) 588-1000

Attorney for Petitioner Public Citizen

Attorneys for All Petitioners

**PETITIONERS' CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a), Petitioners submit the following certificate as to parties, rulings, and related cases.

A. Parties

The parties to this case are:

Petitioners: INTERNATIONAL BROTHERHOOD OF
TEAMSTERS;

TEAMSTERS JOINT COUNCIL NO. 7;

TEAMSTERS JOINT COUNCIL NO. 42;

PUBLIC CITIZEN; and

SIERRA CLUB.

Respondents: UNITED STATES DEPARTMENT OF
TRANSPORTATION;

FEDERAL MOTOR CARRIER SAFETY
ADMINISTRATION;

RAY LAHOOD, Secretary of the U.S.
Department of Transportation;

ANNE S. FERRO, Administrator of the
Federal Motor Carrier Safety
Administration; and

UNITED STATES OF AMERICA.

B. Rulings under Review

The rulings at issue are: (i) the notice of intent by the Federal Motor Carrier Safety Administration to proceed with a pilot program that would authorize trucking companies based in Mexico to perform long-haul operations within the United States, beyond the current commercial zone at the border, as set forth in the agency's July 8, 2011 Federal Register Notice (76 Fed. Reg. 40420 (July 8, 2011)); and (ii) the agency's Finding Of No Significant Impact and Final Environmental Assessment regarding the pilot program, notice of which appeared in the Federal Register on October 3, 2011. 76 Fed. Reg. 61138 (Oct. 3, 2011). The rulings are attached to the amended petition for review, filed November 23, 2011.

C. Related Cases

The only related case of which Petitioners are aware is *OOIDA v. FMCSA*, D.C. Circuit Case No. 11-1251.

Dated: December 21, 2011

/s/ Stephen P. Berzon
/s/ Jonathan Weissglass

Stephen P. Berzon
Jonathan Weissglass

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners certify that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Dated: December 21, 2011

/s/ Stephen P. Berzon

/s/ Jonathan Weissglass

Stephen P. Berzon

Jonathan Weissglass

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2007 Act	U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007
APA	Administrative Procedure Act
DEA	Draft Environmental Assessment
DOT	Department of Transportation
EA	Environmental Assessment
EIS	Environmental Impact Statement
FEA	Final Environmental Assessment
FMCSA	Federal Motor Carrier Safety Administration
FMVSSs	Federal Motor Vehicle Safety Standards
FONSI	Finding Of No Significant Impact
IBT	International Brotherhood of Teamsters
LFC	Licencia Federal de Conductor
NAFTA	North American Free Trade Act
NEPA	National Environmental Policy Act
Section 31315(c)	49 U.S.C. §31315(c)
ULSD	Ultra Low Sulfur Diesel

STATEMENT OF JURISDICTION

Petitioners have filed a petition for review and an amended petition for review challenging the decision by the Federal Motor Carrier Safety Administration (“FMCSA”) to proceed with a pilot program that would authorize trucking companies based in Mexico to perform long-haul operations within the United States, beyond the current commercial zone at the border, as set forth in FMCSA’s July 8, 2011 Federal Register Notice. 76 Fed. Reg. 40420 (July 8, 2011). Petitioners contend that the pilot program violates applicable safety statutes, including: Section 6901 of the U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, 121 Stat. 112 (the “2007 Act”); 49 U.S.C. §31315(c) (“Section 31315(c)”); and 49 U.S.C. §§30112 and 30115. The pilot program is arbitrary, capricious, and otherwise contrary to law within the meaning of the Administrative Procedure Act (“APA”), 5 U.S.C. §706(2)(A).

Petitioners also challenge, pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§4321-4370h, and its implementing regulations, 40 C.F.R. §§1500-1508.28, FMCSA’s Finding Of No Significant Impact (“FONSI”) and Final Environmental Assessment (“FEA”) regarding the pilot program, notice

of which appeared in the Federal Register on October 3, 2011. 76 Fed. Reg. 61138 (Oct. 3, 2011).

The federal courts of appeals have “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all rules, regulations, or final orders of . . . the Secretary of Transportation issued pursuant to . . . chapter 313 . . . of title 49.” 28 U.S.C. §2342(3)(A). The Secretary of Transportation is authorized to conduct pilot programs evaluating commercial motor vehicle safety, such as the one at issue here, pursuant to chapter 313 of title 49. *See* 49 U.S.C. §31315.

Agency action is final and reviewable if “(1) it is ‘the consummation of the agency’s decisionmaking process,’ and (2) ‘rights or obligations have been determined’ by the action or ‘legal consequences will flow’ from it.” *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1037 (D.C. Cir. 2002) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). FMCSA’s decision to implement the pilot program, as well as its associated environmental decisions, meet this standard.

The petition and amended petition are timely pursuant to 28 U.S.C. §2344, which permits a petition for review to be filed within 60 days after the entry of a final order, and Rule 15(a)(1) of the Federal Rules of Appellate Procedure. The

petition was filed in the United States Court of Appeals for the Ninth Circuit on September 2, 2011, within 60 days of the July 8, 2011 Federal Register Notice setting forth FMCSA's decision to proceed with the pilot program. 76 Fed. Reg. at 40420. The petition was subsequently transferred to this Court pursuant to 28 U.S.C. §2112(a)(5). The amended petition was filed on November 23, 2011, within 60 days of the October 3, 2011 notice of the challenged environmental decisions. 76 Fed. Reg. at 61138.

STATEMENT OF THE ISSUES

1. Whether the pilot program FMCSA approved to authorize trucking companies based in Mexico to perform long-haul operations within the United States beyond the current commercial zones at the border is arbitrary, capricious, and contrary to law because:

a. It permits Mexico-domiciled trucks to enter the United States without complying with federal safety standards, including by failing to display certificates of compliance;

b. It is not designed to yield statistically valid findings;

c. It recognizes compliance with Mexico's vision standards for commercial truck drivers to be equivalent to compliance with the vision standards

applicable to U.S. commercial truck drivers, and fails to provide any reasoned analysis to support that decision;

d. It provides Mexico-domiciled motor carriers with “credit” for the amount of time they held provisional operating authority under a terminated pilot program; and

e. Its grant of operating authority to Mexico-domiciled motor carriers has not been shown to be simultaneous and comparable to the authority Mexico will grant U.S.-based motor carriers.

2. Whether FMCSA violated NEPA, 42 U.S.C. §§4321-4370h, because:

a. It issued a Draft Environmental Assessment (“DEA”), FEA, and FONSI only after committing to proceed with the pilot program;

b. It misconstrued *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), and its own statutory authority, and therefore failed to consider the appropriate impacts of the pilot program; and

c. It failed properly to consider alternatives to the pilot program.

STATUTES AND REGULATIONS

Applicable statutes and regulations are contained in the Addendum of Statutes and Regulations.

STATEMENT OF FACTS

A. Cross-Border Trucking History And Prior Litigation

In 1982, Congress imposed a moratorium prohibiting Mexico-domiciled trucks from operating within the United States. 76 Fed. Reg. at 40422. As a result, Mexico-domiciled trucks were restricted to operating in limited commercial zones on the U.S.-Mexico border. 72 Fed. Reg. 46263, 46264 (Aug. 17, 2007)

Congress has taken an active role in overseeing modifications to this almost 30-year regime to ensure that any plan to grant authority to Mexico-domiciled trucks to operate beyond the border zone is carried out in a safe and responsible manner. In 2002, Congress enacted specific preconditions and safety criteria that FMCSA had to satisfy before any funds could be expended to review or process applications from Mexico-domiciled trucks to operate beyond the border zone. Department of Transportation and Related Agencies Appropriations Act for Fiscal Year 2002, Pub. L. No. 107-87, 115 Stat. 833, §350; *see also* 76 Fed. Reg. at 40421. Congress has imposed these restrictions in each subsequent Department of Transportation (“DOT”) appropriations law. 76 Fed. Reg. at 40421.

FMCSA promulgated regulations to comply with these restrictions, which the U.S. Supreme Court upheld in a 2004 decision. *Id.* at 40422; *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

In February 2007, FMCSA announced a pilot program to permit select Mexico-domiciled motor carriers to operate throughout the United States, beyond the border zone. 72 Fed. Reg. at 46264. Because FMCSA had not complied with public notice and comment requirements, on April 23, 2007, Petitioners filed a petition for review in the Ninth Circuit. *Sierra Club v. United States Dep't of Transp.*, 9th Cir. Case No. 07-71609. On May 1, 2007, FMCSA published a notice in the Federal Register and requested public comment. 72 Fed. Reg. 23883 (May 1, 2007). Accordingly, on Petitioners' motion, the case was dismissed on June 19, 2007.

Meanwhile, in May 2007, in response to FMCSA's announcement that it intended to begin granting Mexico-domiciled carriers the right to operate throughout the United States, Congress passed the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, 121 Stat. 112; *see also* 76 Fed. Reg. at 40421. The 2007 Act provided that FMCSA would be permitted to grant long-haul operating authority to Mexico-domiciled trucks only if that grant were "first tested as part of a pilot program." 2007 Act, §6901(a)(1).

Congress further mandated that the pilot program comply with 49 U.S.C. §31315(c). 2007 Act, §6901(a)(2). Section 31315(c) makes it a "condition of

approval” of any pilot program that “the safety measures in the project are designed to achieve a level of safety that is equivalent to, or greater than, the level of safety that would otherwise be achieved through compliance with the regulations prescribed under this chapter or section 31136.” 49 U.S.C.

§31315(c)(2). The law further requires that any pilot program plan include “[a] reasonable number of participants necessary to yield statistically valid findings.” 49 U.S.C. §31315(c)(2)(C).

The 2007 Act also provided that “simultaneous and comparable authority to operate within Mexico” must be made available to U.S. motor carriers. 2007 Act, §6901(a)(1).

On June 8, 2007, FMCSA published another notice in the Federal Register purporting to respond to these and other requirements of the 2007 Act. 72 Fed. Reg. 31877 (June 8, 2007). There was a great deal of comment on FMCSA’s proposal. *E.g.*, 72 Fed. Reg. at 46266 (summarizing comments in opposition). On August 17, 2007, FMCSA published a notice in the Federal Register responding to public comments and stating that the agency intended to proceed with the pilot program. *Id.* at 46263-64.

On August 29, 2007, Petitioners filed a petition for review in the Ninth Circuit, challenging the failure of the pilot program to comply with various federal

laws. *Sierra Club v. United States Dep't of Transp.*, 9th Cir. Case No. 07-73415.

While the petition was pending, Congress enacted the 2009 Omnibus Appropriations Act, Pub. L. No. 111-8, 123 Stat. 524. *See Sierra Club v. United States Dep't of Transp.*, 563 F.3d 897 (9th Cir. 2009). Section 136 of that law prohibited expending funds for the 2007 pilot program. In response, on March 18, 2009, DOT announced that it had terminated the program. 74 Fed. Reg. 11628 (Mar. 18, 2009). The Ninth Circuit subsequently dismissed the petition for review of that pilot program as moot. *Sierra Club v. United States Dep't of Transp.*, 563 F.3d at 898.

B. Current Litigation

After Congress removed the 2009 funding restriction (but not the 2007 Act's limitations), FMCSA provided notice and an opportunity for comment on the current pilot program. 76 Fed. Reg. at 40423. The April 13, 2011 Federal Register Notice provided a description of the program and sought comment by May 13, 2011. 76 Fed. Reg. 20807 (Apr. 13, 2011).

The agency received more than 2,000 comments, of which more than 1,000 were submitted by persons on behalf of the International Brotherhood of Teamsters ("IBT"). 76 Fed. Reg. at 40424. Petitioner IBT itself submitted an 11-page comment letter. JA 14-24. IBT and other commenters opposed the pilot

program on a number of grounds, including that the program unlawfully purported to waive certification requirements of the Motor Vehicle Safety Act, 49 U.S.C. §§30112 and 30115; that the program would not yield statistically valid results; that compliance with Mexico's vision requirements for commercial drivers would not yield the same level of safety as compliance with U.S. vision requirements; that FMCSA wrongly decided to provide Mexico-domiciled carriers with "credit" for the time they participated in the previous, terminated pilot program; and that U.S. carriers would not receive simultaneous and comparable access to Mexico's roadways. JA 14-81; *see also* 76 Fed. Reg. at 40434. Despite these and other objections, FMCSA decided to "proceed with the pilot program." 76 Fed. Reg. at 40420.

Thereafter, on July 12, 2011, in an attempt to comply with NEPA, FMCSA announced the availability of a DEA with respect to the pilot program, and sought comment by August 11, 2011. 76 Fed. Reg. 40980 (July 12, 2011). The agency received comments, including from Petitioners IBT and Sierra Club. JA 413-19. Among other objections to the DEA, the comments protested FMCSA's issuance of the DEA only after finalizing plans for the pilot program; FMCSA's misinterpretation of the Supreme Court's decision in *Public Citizen* and consequent failure to conduct a proper NEPA analysis; FMCSA's failure to

consider various regulatory alternatives that could mitigate the environmental impacts of the pilot program; and FMCSA's failure adequately to consider the public safety, health, and environmental justice effects of the Pilot Program. JA 397-420. FMCSA, however, made no substantive changes to its environmental analysis or the pilot program and proceeded to issue a FONSI and FEA. JA 421-74. The agency announced these decisions in an October 3, 2011 Federal Register Notice. 76 Fed. Reg. at 61138-39.

In their amended petition for review, filed November 23, 2011, Petitioners challenge the pilot program for failing to comply with several federal safety laws and with NEPA.

SUMMARY OF ARGUMENT

FMCSA failed to comply with safety statutes and regulations that expressly govern the grant of any long-haul operating authority to Mexico-domiciled trucking companies and that ensure the safe operation of trucks on the nation's highways. First, the pilot program unlawfully permits Mexico-domiciled motor carriers to enter the United States with vehicles that do not comply with the certification requirements of the Motor Vehicle Safety Act, 49 U.S.C. §§30112 and 30115. Although these provisions unambiguously require any vehicle

entering the United States to bear a certification showing that it has been built to applicable safety standards, FMCSA unlawfully waived this requirement.

Second, FMCSA did not meet the requirements of the 2007 Act and Section 31315(c) that any pilot program be designed to produce statistically valid findings. Instead, FMCSA has created a program that is not assured of having a sufficient or representative sample of Mexico-domiciled motor carriers to yield valid findings, and that merely presumes – but cannot demonstrate – that Mexico-domiciled trucks are as safe as their U.S. counterparts.

Third, FMCSA’s determination that acceptance of Mexico’s vision standards for commercial drivers (which require only that drivers recognize the color red) will achieve an equivalent level of safety as compliance with the U.S. standards (which require recognition of red, green, and yellow), is unsupported by the record and contrary to the agency’s long-standing position that the U.S. standards are necessary to ensure safety on the roads.

Fourth, the pilot program improperly grants “credit” to Mexico-domiciled motor carriers that participated in FMCSA’s 2007 pilot program, allowing them to count time in that program toward their required 18-month provisional operating period.

Finally, the pilot program does not ensure that U.S. motor carriers will receive “simultaneous and comparable” access to Mexico’s roadways as required by the 2007 Act because FMCSA did not address that fuel required by modern U.S. trucks is not widely available in Mexico, and thus U.S. motor carriers will not be able to travel throughout Mexico.

In addition to these significant safety issues, in developing the pilot program, FMCSA failed to adhere to the requirements of NEPA. First, FMCSA prepared no environmental documents whatsoever during its planning process. NEPA requires an assessment of environmental impacts and alternatives be made sufficiently early to be capable of affecting the action the agency ultimately takes. *E.g.*, 40 C.F.R. §1500.1(b) (requiring environmental information be made “available to public officials and citizens *before* decisions are made and *before* actions are taken”) (emphases added). Rather than making a true inquiry into the environmental impacts of the pilot program at a time when those impacts might still be mitigated, FMCSA simply justified its decisions after-the-fact.

Second, the scope of the environmental assessment (“EA”) is grossly inadequate. In conducting its EA, FMCSA misconstrued the Supreme Court’s decision in *Public Citizen* as well as its own statutory authority. As a result, the FEA – by FMCSA’s admission – addresses only environmental effects related to

the pilot program's inspection regime at the border. FMCSA takes no account of the impacts of the other key decisions it made in designing and implementing the program, including choices about safety that will affect the environment.

FMCSA's mistake about the legal import of *Public Citizen* is an error of law that requires FMCSA to conduct a new NEPA analysis.

Third, "the heart" of a NEPA environmental document is the required examination of alternatives to the proposed courses of action. 40 C.F.R. §§1502.14, 1508.25. Yet FMCSA refused to consider any of the viable alternatives that Petitioners and others provided to the agency. This failure, too, requires a new NEPA analysis.

STANDING

Before turning to the merits, we demonstrate that Petitioners have standing to bring this action. It is well settled that only one petitioner need establish standing. *E.g., Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981). Here, at least one Petitioner has standing for every claim. Indeed, this Court previously found that IBT has standing to challenge a DOT rule that would facilitate cross-border trucking. *IBT v. Peña*, 17 F.3d 1478, 1482-84 (D.C. Cir. 1994). Accordingly, most of the questions surrounding standing are already settled.

1. The statute providing for review of the pilot program permits “[a]ny party aggrieved” to file a petition for review. 28 U.S.C. §2344. To qualify as an aggrieved party, a petitioner must show: “(1) ‘party’ status (i.e., that petitioner[] participated in the proceeding before the agency), and (2) aggrievement (i.e., that [the petitioner] meet[s] the requirements of constitutional and prudential standing).” *Reyblatt v. U.S. Nuclear Regulatory Com’n*, 105 F.3d 715, 720 (D.C. Cir. 1997) (internal citations omitted).

As to the first prong, IBT and the Sierra Club participated in the agency proceedings. JA 14-24, 413-19. Accordingly, there can be no question about their “party” status.

As to the second prong, organizations may bring claims on behalf of their members if a member would have standing to bring suit. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). We turn to that question next.¹

2. To satisfy the “irreducible constitutional minimum of standing” under Article III of the Constitution, a litigant must show that “(1) it suffers an ‘injury in

¹ Because standing was not at issue in the administrative proceedings, in addition to the record, Petitioners rely on declarations of the following persons filed with this Court in the Addendum of Declarations in Support of Standing: Deane Allen (“Allen Dec.”), Jack Cawood (“Cawood Dec.”), Leslie Fields (“Fields Dec.”), Kelsey Frazier (“Frazier Dec.”), James Kimball (“Kimball Dec.”), and Jonathan Weissglass (“Weissglass Dec.”).

fact' that is concrete, particularized, and actual or imminent, (2) there is a causal relationship between the injury and the conduct complained of, and (3) it is likely that the injury will be redressed by a favorable decision.” *Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Although the injury to a litigant must be concrete, there is no requirement that it be large. *See, e.g., Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) (en banc) (“the claimed injury need not be large, an identifiable trifle will suffice”) (internal quotation marks omitted).

It is well-established that the test for standing is less stringent where procedural rights are at issue. *See, e.g., Lujan*, 504 U.S. at 572 n.7. With respect to the required injury, litigants must show that disregard of the procedural requirement at issue “could impair a concrete interest of theirs.” *City of Dania Beach v. FAA*, 485 F.3d 1181, 1185 (D.C. Cir. 2007) (quoting *Lujan*, 504 U.S. at 572). As to causation and redressability, courts accept “a causal relationship between the procedural defect and the final agency action,” and all a litigant must demonstrate is some “causal connection between the agency action and the alleged injury.” *Id.* at 1186.

a. Petitioners claim that FMCSA's pilot program violates provisions that are intended to protect the safety of drivers and passengers on U.S. roadways as well as to ensure a level playing field for U.S. businesses and workers. For instance, the 2007 Act that requires FMCSA to proceed through a pilot program is directly concerned with the potential effects of Mexico-domiciled motor carriers on the safety of U.S. roads and access of U.S. trucks to Mexico. 2007 Act, §6901(a)(1) (incorporating requirement of Section 31315(c) that pilot program plan be approved only if it achieves a level of safety equivalent to that ensured by existing U.S. laws and regulations), §6901(a)(3) (requiring simultaneous and comparable access for U.S. trucks in Mexico).

The implementation of the pilot program imposes injury on IBT members that meets the test for both procedural and substantive standing. This Court previously has found that IBT demonstrated concrete injury in challenging an agency rule that would increase the number of Mexico-domiciled drivers and make highways less safe for its members. *IBT v. Peña*, 17 F.3d at 1483. As the Court noted, "the union's members spend far more time on the roads than most other Americans," and "[r]eductions in highway safety would cause more harm to them than to typical members of the public at large." *Id.*

As in *IBT v. Peña*, it is difficult to imagine individuals with a more personal reason to be concerned about highway safety than those who make their living driving on the nation's highways. IBT represents approximately 1.3 million workers in the United States, including an estimated 600,000 truck drivers who operate on roadways throughout the United States. Kimball Dec., ¶¶2, 6. For example, approximately 90,000 IBT members are classified as road drivers, each of whom typically logs 100,000 miles per year, many of which are on interstate highways. *Id.*, ¶6. Additionally, more than 500,000 IBT members drive local cartage and other trucks, logging about 2,300 hours per year on the road. *Id.* Because IBT members spend such a great amount of time on the nation's roads, the safety of the drivers and the vehicles on the roads necessarily affects the members' safety. *See, e.g., id.*, ¶8; Allen Dec., ¶8; Frazier Dec., ¶4.²

Likewise, IBT's members suffer *economic* injury. Mexico-domiciled pilot program participants are subject to less stringent safety (and environmental) regulations than U.S. trucks and drivers. For this reason, IBT members are likely to suffer reduced job security and income. *E.g.,* Allen Dec., ¶9; Kimball Dec., ¶10. Economic injury, such as the "loss of [income] that plaintiffs claimed would

² Moreover, many IBT members drive in the southern, southwestern, and western United States, where pilot program participants are most likely to traverse. *E.g.,* Allen Dec., ¶¶3, 8; Kimball Dec., ¶7; Weissglass Dec., Exh. A at 15.

flow from [an agency's] unduly permissive regulation of competitors" is a constitutionally sufficient injury. *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1233 (D.C. Cir. 1996).

Causation and redressability are easily satisfied. FMCSA's failure to ensure that pilot program participants comply with adequate safety standards is the cause of the injuries to IBT members' safety and economic interests. This Court, by setting aside the program until and unless it satisfies all applicable laws, can redress those injuries.

b. As to NEPA, the statute imposes only procedural requirements. *Public Citizen*, 541 U.S. at 756. The failure of a government agency to conduct an EA or environmental impact statement ("EIS") in accordance with NEPA is the "archetypal procedural injury." *National Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005). This is precisely the claim that IBT and the Sierra Club raise on behalf of themselves and their members.

Members of both organizations who live near the border, live along major trucking thoroughfares from the border throughout the west, southwest, and south, or work driving trucks (in the case of IBT members) in areas where pilot program participants are most likely to travel will bear the brunt of the environmental harms from the pilot program. *E.g.*, Fields Dec., ¶6; Kimball Dec., ¶9, Cawood

Dec., ¶¶3, 8-9; Weissglass Dec., Exh. A at 15. These members therefore have particularized interests injured by the pilot program.

One specific harm associated with the pilot program stems from the diesel engine exhaust emitted by the Mexico-domiciled trucks participating in the program. Those trucks are likely to emit higher levels of pollution than the U.S. trucks they will be replacing. JA 415-16; Weissglass Dec., Exh. A at 4-5, 16-21. An example of the injury stemming from this pollution is an IBT member who states that he regularly travels on a highway with significant trucking traffic from the border zone, is constantly exposed to diesel exhaust while driving his truck, and his asthma is aggravated when he is exposed to diesel exhaust. Cawood Dec., ¶¶3, 8. Moreover, diesel engine exhaust is listed under California's Proposition 65 as a chemical "known to the state to cause cancer." 27 C.C.R. 27001(b). Three separate studies suggest an increased risk of lung cancer for truck drivers who are exposed to diesel exhaust. Kimball Dec., ¶9. IBT and Sierra Club members are concerned about FMCSA's actions not simply out of some armchair interest in the environment, but because *their* personal environment is affected by the pilot program.

3. Associational standing also requires an organization to show that "the interests the association seeks to protect are germane to its purpose" and that

“neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit.” *Sierra Club v. EPA*, 292 F.3d at 898. These two prongs are easily met. Protecting the safety, health, and economic security of its members are germane to IBT’s broad purposes, as set forth in the IBT Constitution. Kimball Dec., Exh. A at 4 (“The objects of this International Union are also to secure improved wages, hours, working conditions, and other economic advantages[;] . . . to advance the rights of workers . . . and the security and welfare of all the people by political, educational, and other community activity.”). Similarly, protecting the environment is a mission of the Sierra Club. Fields Dec., ¶3. As no damages are sought in this action, only declarative and injunctive relief, the participation of individual members in the action is not necessary. *E.g., Humane Soc. of the U.S. v. Hodel*, 840 F.2d 45, 53 (D.C. Cir. 1988) (“[D]eclaratory and injunctive relief . . . is clearly not of a type that requires the participation of any individual member.”).

4. Prudential limitations on standing prohibit a suit for violation of a statutory provision unless it protects or regulates the litigant’s interests. *Mountain States Legal Foundation*, 92 F.3d at 1237. A petitioner falls outside a “statute’s zone of interests only if [the petitioner’s] interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be

assumed that Congress intended to permit the suit.” *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, 373 F.3d 1251, 1279-80 (D.C. Cir. 2004).

a. IBT members’ interests in safety fall within the zones of interest of the provisions they invoke because each of the claims advanced addresses safety (other than NEPA, which we address below). This exact congruence is more than sufficient. IBT members’ economic interests also fall within the zone of interests of the statutory schemes, which were meant to ensure parity in treatment of U.S. and Mexico-domiciled trucks. *See* 2007 Act, §6901(a)(3); 73 Fed. Reg. 76472 (Dec. 16, 2008) (describing parallel safety oversight programs during 18-month provisional period for newly authorized U.S.- and Mexico-domiciled motor carriers).

b. The interests of the IBT and Sierra Club also fall within the zone of interests protected by NEPA. Persons who “assertedly are affected by noise, air pollution and congestion from vehicles,” and who seek to vindicate “those health and conservational interests” fall “clearly within the zone of protection afforded by NEPA.” *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 998 (D.C. Cir. 1979); *see also City of Dania Beach*, 485 F.3d at 1185-86 (finding “little difficulty concluding that the injuries asserted by petitioners,” including noise and air pollution suffered as a result of “hasty federal

actions taken without regard for possible environmental consequences,” are “exactly the types of injuries that NEPA’s procedural requirements were intended to mitigate”).

ARGUMENT

I. STANDARD OF REVIEW

Courts set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or that is taken “without observance of procedure required by law.” 5 U.S.C. §706(2)(A), (D). The Court reviews purely legal questions *de novo*. *Association of Civilian Technicians v. Federal Labor Relations Auth.*, 269 F.3d 1112, 1115 (D.C. Cir. 2001). Where courts must interpret federal law to determine if it has been violated by agency action, the Supreme Court has instructed that, “[i]f the intent of Congress is clear, that is the end of the matter.” *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). That remains the case even if an agency has a contrary interpretation. *See National Ass’n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007) (“If the intent of Congress is clear, [courts] accord the agency’s interpretation no deference.”).

Where a factual inquiry is necessary, the Court engages in a “thorough, probing, in-depth review” of the agency’s reasoning. *Citizens to Preserve Overton*

Park, Inc. v. Volpe, 401 U.S. 402, 415-17 (1971). An agency’s decision should be upheld only where the agency has shown that its decision is lawful and has “articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citations omitted).

Additionally, “the consistency of an agency’s position is a factor in assessing the weight that position is due.” *National Federation of Federal Employees, Local 1309 v. Department of Interior*, 526 U.S. 86, 108 (1999); see also *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991) (“[T]he case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.”). Even with respect to its own regulations, an agency is not entitled to deference where its interpretation is inconsistent with a regulation. *National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 672 (2007).

Judicial review of an EA must be more than “merely perfunctory”; a reviewing court’s task is to assure that the agency took a “hard look” at the environmental consequences of its decisions. *Sierra Club v. Peterson*, 717 F.2d

1409, 1413 (D.C. Cir. 1983). This Court reviews an agency's finding of no significant impact to determine whether:

First, the agency [has] accurately identified the relevant environmental concern. Second, once the agency has identified the problem it must have taken a "hard look" at the problem in preparing the EA. Third, if a finding of no significant impact is made, the agency must be able to make a convincing case for its finding. Last, if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that the changes or safeguards in the project sufficiently reduce the impact to a minimum.

Town of Cave Creek, Arizona v. F.A.A., 325 F.3d 320, 327 (D.C. Cir. 2003)

(interpolation in original).

II. FMCSA DID NOT COMPLY WITH FEDERAL SAFETY REQUIREMENTS

The long congressional history of legislating with respect to cross-border trucking, and trucking safety generally, has resulted in a number of statutes that ensure the safe entry of Mexico-domiciled trucks to the U.S. The program fails to comply with several of these important statutory provisions.

A. The Pilot Program Does Not Require Compliance With U.S. Motor Vehicle Safety Standards

The pilot program unlawfully permits Mexico-domiciled motor carriers to violate federal motor carrier safety standards and to enter the United States in

violation of two provisions of the Motor Vehicle Safety Act, 49 U.S.C. §§30112 and 30115.

Pursuant to 49 U.S.C. §30112, with certain exceptions not applicable here, “a person may not . . . introduce . . . in interstate commerce, or import into the United States, any motor vehicle . . . manufactured on or after the date an applicable motor vehicle safety standard . . . takes effect unless the vehicle . . . complies with the standard and is covered by a certification issued under section 30115 of this title.” 49 U.S.C. §30112(a). Section 30115, in turn, requires “[a] manufacturer or distributor” to certify that a vehicle complies with the applicable motor vehicle safety standards. “Certification of a vehicle must be shown by a label or tag permanently fixed to the vehicle.” Manufacturer certification is critical to ensuring that trucks entering the U.S. have been built to meet all safety standards.

The certification requirements of the Motor Vehicle Safety Act unambiguously apply to Mexico-domiciled motor vehicles entering the United States for temporary and commercial purposes, as such motor vehicles are thereby both “introduc[ed] . . . in interstate commerce” and “import[ed] into the United States.” 49 U.S.C. §30112. DOT previously acknowledged that trucks and buses

coming to the U.S. must be certified as complying with U.S. motor vehicle safety standards. *See* 67 Fed. Reg. 12806, 12807 (Mar. 19, 2002).

Nonetheless, FMCSA now asserts that these Federal Motor Vehicle Safety Standards (“FMVSSs”) “do not obligate foreign-domiciled trucks engaging in cross-border trade to bear a certification label.” 76 Fed. Reg. at 40434. This argument is based entirely on the withdrawal of a policy statement by the National Highway Traffic Safety Administration wherein that agency had interpreted the term “import” as applying to foreign-based motor carriers operating in the United States. *Id.*; *see also* 70 Fed. Reg. 50277 (Aug. 26, 2005). But the withdrawal of a policy statement cannot override the plain meaning of the statutory language.

Moreover, FMCSA’s quibble with whether Mexico-domiciled trucks that cross into the United States meet the definition of “import” misses two critical points. First, the argument does not address the separate statutory language that applies the certification requirement to trucks “introduc[ed] . . . in interstate commerce.” 49 U.S.C. §30112. Second, even with respect to the “import” provision, FMCSA erroneously attempts to distinguish between “import” of a motor vehicle and the entry of Mexico-domiciled trucks into the U.S. But the Motor Vehicle Safety Act used the terms “enter” and “entry” interchangeably with “import” and “importation.” *See* H.R. Rep. 103-180, at 100 (1994), *reprinted in*

1994 U.S.C.C.A.N. 818, at 989. Thus, in 1994, when Congress codified the Act, “for consistency,” Congress replaced several references to “entry,” “enters,” and “entered” with respect to motor vehicles with the terms “imports,” “imported,” and “importation.” *Id.* “[I]t will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed.” *Finley v. United States*, 490 U.S. 545, 554 (1989). In this case, the purpose of the recodification was “to restate in comprehensive form, without substantive change” the existing law. H.R. Rep. 103-180, at 1, *reprinted in* 1994 U.S.C.C.A.N. at 818. The references to “import” of a motor vehicle therefore must be read as covering the “entry” of Mexico-domiciled motor vehicles into the United States. There can be no question that those trucks are *entering* the United States.

FMCSA acknowledges that “Mexico-domiciled vehicles may be less likely to display FMVSS certification labels.” 76 Fed. Reg. at 40435. Instead of requiring compliance with federal law, however, the pilot program provides that Mexico-domiciled motor carriers may, *themselves*, certify that their motor vehicles comply. *Id.* at 40434 (pilot program merely “requires Mexico-domiciled motor carriers to certify on their applications for operating authority” that their vehicles “meet the applicable FMVSSs,” and does not require vehicles to display

certification label). Such “self-certification” certainly is not the certification Congress required, which must be made by a “manufacturer or distributor” and must be “shown by a label or tab permanently fixed to the vehicle.” 49 U.S.C. §30115.

FMCSA does not have the authority to excuse compliance with the Motor Vehicle Safety Act. Both 49 U.S.C. §§30112 and 30115 are mandatory and identify only specific limited exceptions to the certification requirement, none of which permit FMCSA to waive the statutory requirements for Mexico-domiciled participants in the pilot program. Congress made the determination to impose a labeling requirement. It is not FMCSA’s prerogative to decide to allow self-certification and inspection.

Even if FMCSA had the authority to waive these statutory requirements, its reasoning does not support its result. FMCSA asserts that it has determined that “it is not necessary to require participating motor carriers to ensure their [commercial motor vehicles] display an FMVSS certification label.” 76 Fed. Reg. at 40435. Instead, FMCSA suggests that inspectors may allow Mexico-domiciled trucks to enter the U.S. even if they do not have a certificate of compliance, so long as the inspectors can determine the vehicle was manufactured in 1996 or later. *See id.* at 40434. This decision, however, is based on information that only

“*most* model year 1996 and later CMVs manufactured in Mexico meet the FMVSSs.” JA 304 (emphasis added); *see also* 76 Fed. Reg. at 40434. The agency provides no explanation as to what model year 1996 and later trucks made in Mexico do *not* meet the FMVSSs and how those trucks fail to comply with the safety standards.

FMCSA’s pilot program purports to waive the strict and unambiguous requirements for program participants – allowing trucks to enter the United States without certificates of compliance – in direct violation of federal law. Agency action that is “not in accordance with law” is owed no deference. 5 U.S.C. §706(2)(A). This Court should prohibit FMCSA from continuing with its rogue pilot program.

B. The Pilot Program Will Not Yield Statistically Valid Results Demonstrating That Mexico-Domiciled Motor Carriers Will Operate At Equivalent Levels Of Safety As U.S.-Domiciled Carriers

The 2007 Act expressly prohibits DOT from granting authority to Mexico-domiciled motor carriers to operate beyond the current commercial zone unless DOT “first test[s]” such authority through a pilot program that “complies with . . . the requirements of section 31315(c) of title 49, United States Code, related to pilot programs.” 2007 Act, §6901(a)(1), (2).

Section 31315(c) in turn imposes requirements that DOT must satisfy “[i]n proposing a pilot program” and “as a condition of approval of the project.” In particular, “the safety measures in the project” must be “designed to achieve a level of safety that is equivalent to, or greater than, the level of safety that would otherwise be achieved.” 49 U.S.C. §31315(c)(2). Additionally, certain “minimum” elements must be present in any “pilot program plan,” including “[a] reasonable number of participants necessary to yield statistically valid findings.” 49 U.S.C. §31315(c)(2)(C).

In other words, Congress required that the first grant of operating authority to Mexico-domiciled trucks to operate beyond the border zone be made as part of a pilot program to permit a true, statistically valid test of whether the dramatic step of opening the border will be safe – or not. FMCSA’s pilot program fails to comply with these requirements in two ways, which we address in turn below.

1. The Pilot Program Is Not Designed To Include A Reasonable And Representative Sample Of Participants Necessary To Produce Statistically Valid Findings

The pilot program must be designed to include “[a] reasonable number of participants to yield statistically valid findings.” 49 U.S.C. §31315(c)(2)(C). The 2007 Act further requires the DOT Inspector General to verify that the program “consists of a representative and adequate sample of Mexico-domiciled carriers

likely to engage in cross-border operations beyond United States municipalities and commercial zones on the United States-Mexico border.” 2007 Act, §6901(c)(3). But the pilot program is not constructed to ensure a reasonable and representative sample of participants necessary to produce reliable results.

FMCSA asserts that the pilot program “will focus on roadside inspection data,” and thus need not include any particular number of program participants; rather, FMCSA claims, the relevant inquiry is whether “the total number of *inspections* performed on the pilot program participants will be sufficient to allow for valid statistical comparisons.” 76 Fed. Reg. at 40435 (emphasis added).

FMCSA’s decision to link the statistical validity of the pilot program to the number of inspections performed on participants – instead of to the number of participants – does not satisfy the requirements of Section 31315(c). As FMCSA previously has recognized, there must be a sufficient number of participating motor carriers to ensure that a pilot program produces useable data. 76 Fed. Reg. at 40433 (2007 pilot program “did not have sufficient participation to allow for . . . statistically valid demonstration” of Mexico-domiciled carriers’ ability to comply with U.S. safety standards); *see also* 73 Fed. Reg. 45796, 45797 (Aug. 6, 2008) (more participants in pilot program needed to ensure “project [could] be reviewed and evaluated on the basis of a more comprehensive body of data”).

Despite its previous acknowledgment that a pilot program could only yield statistically valid results if it had a sufficient number of participants, FMCSA now attempts to distance itself from that position. The agency claims instead that the pilot program need only have enough inspections, and the number of program participants is relevant only to the extent they result in more inspections. 76 Fed. Reg. at 40435. The problem with this changed position, however, is that even if the pilot program produces a large number of inspections, the results of those inspections mean nothing if they come from a small and unrepresentative sample of motor carriers. FMCSA apparently recognizes this flaw, admitting that “the statistical validity of the findings [will] hinge[] upon the representativeness of the study data.” 76 Fed. Reg. at 40435.

But the agency simply ignores the problem in designing the pilot program. Instead of requiring a certain level of participation from a representative sample of motor carriers, FMCSA promises (at the conclusion of the pilot program) to review the violation rates for the overall population of Mexico-domiciled carriers, as well as the rates of individual carriers. 76 Fed. Reg. at 40436. As FMCSA acknowledges, however, such a review will serve only to assess whether the “inspection data [are] dominated by a small number of motor carriers” (*id.*) – that is, whether the overall violation rates for program participants are representative

of the *participating* carriers. *Id.* The review will not ensure that the anticipated small number of participating motor carriers is representative of those likely to engage in long-haul trucking were the border to be opened entirely. The pilot program is *not* designed to yield statistically valid findings because it is not designed to ensure participation by a reasonable and representative sample of motor carriers.

Even were FMCSA correct that reviewing the data to assess whether the total inspection data are not dominated by a few carriers was a proper approach to ensuring the representative nature of the participants (which it is not), this post-hoc review of representativeness is not what Congress intended when it required that a pilot program be “*designed*” to ensure statistically valid findings. 49 U.S.C. §31315(c) (identifying minimum elements in “each pilot program *plan*” approved). It is not acceptable for FMCSA to postpone considering the “magnitude of [the] problem” with the representative nature of its data until the conclusion of the pilot program. 76 Fed. Reg. at 40435. Indeed, such an approach would make a mockery of the minimum elements that must be satisfied in any plan for a pilot program; a plan could simply provide that the agency would assess at the end of the plan whether it had “[a] reasonable number of participants to yield statistically valid findings.” 49 U.S.C. §31315(c)(2)(C).

2. The Pilot Program Is Not Designed To Yield Statistically Valid Findings That Mexico-Domiciled Carriers Operate At An Equivalent Level Of Safety As U.S.-Domiciled Carriers

Even were the pilot program properly designed to include sufficient representative participants, the program has yet another design flaw. FMCSA contends that there should be a “presumption that Mexico-domiciled motor carriers are as safe as U.S. motor carriers.” 76 Fed. Reg. at 40435. As a result, the agency argues, the pilot program need only be designed to gather sufficient data to determine “whether this assumption should be rejected or not.” *Id.*

The practical implication of the way FMCSA has designed the pilot program is that, if the program yields inconclusive results (which, as discussed above in Part I.B.1, is likely), the presumption that Mexico-domiciled motor carriers are just as safe as their U.S. counterparts will stand. *Id.* As FMCSA explains, it is only “[i]f one can demonstrate definitively from the pilot program data that Mexico-domiciled motor carriers are inherently less safe than U.S. motor carriers,” that FMCSA “would be justified in . . . restricting Mexico-domiciled motor carrier operations in the United States.” *Id.*

The pilot program is therefore not designed, as the 2007 Act requires, to be a true “test[]” of the safety of granting long-haul operating authority to Mexico-domiciled trucks. 2007 Act, §6901(a)(1). The “test” that Congress required is one

that must be “designed to achieve a level of safety that is equivalent to, or greater than,” the level of safety that would be achieved absent the grant of such authority, and which must “yield statistically valid findings.” 49 U.S.C. §31315(c)(2).

Although the statute does not expressly define the nature of the required findings, the focus on ensuring an equivalent level of safety, combined with the requirement that FMCSA “first test[]” the grant of operating authority (2007 Act, §6901(a)(1)), reflects that Congress, in enacting the 2007 Act, wanted affirmative assurances that the Mexico-domiciled motor carriers were safe; not that Congress merely wanted to ensure the absence of any definitive proof that Mexico-domiciled trucks *are not* safe. FMCSA’s presumption that Mexico-domiciled carriers are just as safe as U.S. carriers is at odds with the congressional mandate that the pilot program test Mexico-domiciled motor carriers for safety.

What is at stake here is whether the pilot program is designed, as Congress intended, to provide a valid test of whether it is safe to open the U.S.-Mexico border to truck traffic on a broader scale. FMCSA surprisingly asserts that its approach of assuming Mexico-domiciled trucks to be inherently safe is the “prudent one.” 76 Fed. Reg. at 40435. But Congress was concerned with the safety implications of granting long-haul operating authority to Mexico-domiciled trucks. The prudent approach, and the one that would comport with congressional

intent, would be to design a pilot program through which the agency would collect evidence sufficient to prove that long-haul operations by Mexico-domiciled motor carriers in the U.S. will result in an equivalent level of safety as currently exists on the country's roadways. Only a true test of cross-border trucking will enable Congress, the agency, and the public to weigh the pros and cons of opening the border entirely. Simply demonstrating that there is no proof that Mexico-domiciled trucks are not safe does not provide any real assurance that the trucks are safe enough to justify opening the border.

FMCSA attempts to rationalize its decision to base the pilot program on an assumption that Mexico-domiciled motor carriers are just as safe as their U.S. counterparts by relying on the North American Free Trade Act ("NAFTA"). 76 Fed. Reg. at 40435. FMCSA argues that the pilot program must be designed to "establish as a fact" that Mexico-domiciled motor carriers are *less* safe than their U.S. counterparts (as opposed to establishing that they result in equivalent levels of safety), because otherwise there "would be no justification for denying these motor carriers full access to our roadways as guaranteed under NAFTA." 76 Fed. Reg. at 40435.

NAFTA, however, in no way "guarantee[s]" access to U.S. roadways in violation of U.S. law. As enacted into law in the United States, NAFTA expressly

provides that U.S. laws regarding motor carrier safety will prevail over any contrary provisions of the treaty. 19 U.S.C. §3312(a)(1) (“No provision of the Agreement . . . which is inconsistent with any law of the United States shall have effect.”); 19 U.S.C. §3312(a)(2) (NAFTA may not be construed “to amend or modify any law of the United States, including any law regarding . . . the protection of human . . . health . . . [or] motor carrier or worker safety”). NAFTA also explicitly permits member states “to adopt, maintain or apply any standards-related measure, including any such measure relating to safety.” NAFTA art. 904(1), 32 I.L.M. 289, 387 (1993). NAFTA in no way overrides the 2007 Act or Section 31315(c), and FMCSA cannot rely on NAFTA to justify its presumption that Mexico-domiciled motor carriers are as safe as their U.S. counterparts.

FMCSA’s current contention that it is somehow obligated to assume that Mexico-domiciled motor carriers are just as safe as U.S. carriers is also belied by its treatment of the prior pilot program in 2007. FMCSA ultimately terminated that program after “determin[ing] that [it] did not have sufficient participation to allow for a statistically valid demonstration that Mexico-domiciled motor carriers as a whole could comply with U.S. safety standards.” 76 Fed. Reg. at 40433. Thus, FMCSA previously recognized that a pilot program should “demonstrat[e]” that Mexico-domiciled carriers “*could* comply with U.S. safety standards” (*id.*)

(emphasis added)) – and not merely to test a presumption that the carriers did comply.

C. The Pilot Program Is Not Designed To Ensure An Equivalent Level Of Safety Because The Program Permits Mexico-Domiciled Drivers That Do Not Meet U.S. Safety Standards For Vision To Operate Long-Haul Trucks Within The United States

As discussed above, the pilot program must “achieve a level of safety that is equivalent to, or greater than, the level of safety” that would exist absent the pilot program. 49 U.S.C. §31315(c)(2). Because the administrative record reflects that FMCSA made no effort to undertake this statutorily required analysis with respect to the vision requirements for drivers of long-haul commercial vehicles, no weight can be given to the agency’s bald, unsupported assertion that the differences in U.S. and Mexican physical qualifications standards for drivers will “not diminish safety and . . . , therefore, the Mexican requirements are equivalent to U.S. requirements.” 76 Fed. Reg. at 40430.

FMCSA asserts in a conclusory manner that it has determined that compliance with Mexico’s vision standards for commercial vehicle drivers, which require that drivers recognize *only* the color red, is equivalent to compliance with U.S. standards, which require drivers to recognize *red, green, and amber*. 76 Fed.

Reg. at 40430. FMCSA provides absolutely no reasoning to support this conclusion.

Instead, the agency first asserts simply that it has “long recognized Mexico’s physical qualification standards.” 76 Fed. Reg. at 40427. Even if it is true that FMCSA has a practice of permitting Mexico-domiciled drivers in the border zone not to comply with the physical requirements applicable to U.S. drivers, that does not address the legal standard under Section 31315(c): The existence of such a practice is not proof that acceptance of Mexico’s vision requirements will result in an equivalent level of safety as would compliance with the requirements applicable to U.S. drivers.

Second, FMCSA cites a 1991 memorandum of understanding between the U.S. and Mexico in which the U.S. agreed to grant reciprocal rights to drivers possessing a Licencia Federal de Conductor (“LFC”) issued by Mexico. 76 Fed. Reg. at 40428 (citing 57 Fed. Reg. 31454, Appendix A (July 16, 1992)). But that agreement provided that the LFC would be deemed to satisfy only the licensing standards contained in 49 C.F.R. part 383. 57 Fed. Reg. 31454, Appendix A. The vision requirements for commercial truck drivers are not licensing standards, but physical requirements for operators, set forth in 49 C.F.R. part 391. 49 C.F.R. §391.41(b)(10); *see also IBT v. Peña*, 17 F.3d at 1485 (noting that 1992

determination did not apply to certain “*operating standards*” set forth in 49 C.F.R. part 391). Thus, the 1991 agreement is inapplicable to the equivalency of U.S. and Mexican vision requirements.

Third, the agency states blithely: “There are some areas where FMCSA’s requirements [for physical qualifications of drivers] are more stringent,” such as the agency’s vision requirements, but “it was FMCSA’s considered judgment that these differences would not diminish safety.” 76 Fed. Reg. at 40430. There is no explanation at all as to why this was the agency’s “considered judgment.” An agency must provide some reasoned basis to support its conclusions. *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 56. FMCSA’s failure to offer any justification for its conclusion that application of Mexico’s red-only vision requirement would result in an equivalent level of safety as the U.S. requirement that drivers be capable of distinguishing between red, green, and amber, is alone sufficient to find that the agency has not satisfied the requirements of Section 31315(c).³

³ FMCSA asserts that some Mexican physical qualification standards are more stringent than U.S. standards, while some are less stringent. 76 Fed. Reg. at 40430. But that Mexico may have more stringent requirements with respect to one physical attribute (for example, Body Mass Indices) bears no logical correlation to the agency’s assertion that Mexico’s failure to require drivers to be able to distinguish red, green, and yellow will “not diminish safety.” *Id.*

Even if FMCSA had attempted to explain why it concluded compliance with Mexico's vision requirements would achieve the equivalent level of safety as compliance with the U.S. vision requirements, any such explanation would fly in the face of decades of fact-finding concerning these requirements. Since 1939, the U.S. has required that commercial drivers be able to recognize red, green, and yellow. 57 Fed. Reg. 6793, 6793-94 (Feb. 28, 1992) (first federal vision standard in 1937 required "adequate perception of red and green colors"; in 1939, vision standard changed to require "ability to distinguish red, green, and yellow"). Current vision standards, which require that drivers "recognize the colors of traffic signals and devices showing standard red, green, and amber," have been in place since 1971. 57 Fed. Reg. at 6794; 49 C.F.R. §391.41(b)(10). They have remained unchanged despite numerous FMCSA studies to determine whether changes were necessary or appropriate, in particular in light of the Americans with Disabilities Act of 1990. *See* 70 Fed. Reg. 51001 (Aug. 29, 2005) (2005 decision by FMCSA not to revisit vision standards, and summarizing studies done in 1991, 1992, 1996, and 1997-98); 57 Fed. Reg. at 6793 (describing congressional direction to review minimum physical qualification standards for commercial drivers in light of Americans with Disabilities Act).

This history reflects FMCSA's reasoned determination that the ability to recognize red, green, and yellow is a necessary safety standard. Given the inconsistency of the agency's current position with its long-held view, FMCSA's new view is entitled to little weight. *See National Federation of Federal Employees, Local 1309*, 526 U.S. at 108; *Pauley*, 501 U.S. at 698. Further, FMCSA has offered *no* evidence to support its conclusion that the Mexico red-only standard will achieve safety levels equivalent to the U.S. vision requirement.

D. The Pilot Program is Unlawful Because It Will Grant Mexico-Domiciled Motor Carriers Permanent Operating Authority Less Than 18 Months After The Carriers Receive Provisional Operating Authority Under This Program

The pilot program provides that Mexico-domiciled motor carriers that participated in FMCSA's 2007 pilot program will receive "credit" for the amount of time they held provisional operating authority under that program, such that once they have a total of 18 months of operation under both programs, they will be eligible for permanent operating authority. 76 Fed. Reg. at 40432-33. This "grandfathering" of participants in the previous pilot program runs counter to FMCSA's own regulations and contravenes Congress's intent that grants of operating authority to Mexico-domiciled motor carriers be tested through a valid pilot program.

The current pilot program generally requires all participating Mexico-domiciled motor carriers to apply for and obtain provisional operating authority; only after holding provisional operating authority for 18 months will the carriers be eligible for permanent operating authority under the pilot program's auspices. *See id.* at 40432. But Mexico-domiciled motor carriers that held provisional operating authority pursuant to the previous, terminated pilot program will not be required to wait 18 months after receiving provisional operating authority through the new pilot program before receiving permanent operating authority. Instead, a motor carrier that, for example, operated for five months under the 2007 program, will be eligible for permanent operating authority 13 months after receiving provisional operating authority through the new pilot program. *See id.* at 40433.

Existing FMCSA regulations govern when the agency may grant permanent operating authority to Mexico-domiciled trucks operating beyond the border zone: "FMCSA may grant permanent operating authority to a Mexico-domiciled carrier no earlier than 18 months *after the date that provisional operating authority is granted* and only after successful completion to the satisfaction of the FMCSA of the safety monitoring system for Mexico-domiciled carriers set out in subpart B of part 385 of this subchapter." 49 C.F.R. §365.507(f) (emphasis added). The

regulation thus links the date on which permanent operating authority may be granted to the “date on which provisional operating authority [was] granted.” *Id.*

Here, there will be two dates on which the Mexico-domiciled motor carriers that participated in both the 2007 and the current pilot program will have received provisional operating authority. First, there is the date they received provisional operating authority under the earlier program, authority that was revoked when the project was terminated in March 2009. 74 Fed. Reg. at 11628. Second, there is the date on which the carriers receive provisional operating authority under the current pilot program. The question for the Court is which of these two dates is the relevant one for purposes of 49 C.F.R. §365.507(f).

FMCSA’s conclusion that the relevant date should be the date on which a carrier *first* received provisional operating authority – even if that authority was later revoked – is unreasonable and should be rejected for at least three reasons.

First, FMCSA regulations demonstrate that where provisional operating authority has been revoked (as here), a carrier may reapply, but the 18-month period starts anew. 49 C.F.R. §385.115(a), (b) (“A Mexico-domiciled motor carrier whose provisional operating authority . . . has been revoked may reapply,” but “carrier will be required to initiate the application process from the beginning”); *see also* 73 Fed. Reg. at 76478 (“reapplying carrier” subject to “new

18-month monitoring period . . . start[ing] upon approval of the new application”). The regulations’ requirement that the 18-month period start anew also reflects that the 18-month period is one, continuous period. FMCSA has offered no legitimate basis for departing from its own regulations. *See National Ass’n of Home Builders*, 551 U.S.at 672 (“An agency’s interpretation of the meaning of its own regulations” is not entitled to deference if “plainly erroneous or inconsistent with the regulation.”) (internal quotation marks omitted).

Second, only an interpretation of 49 C.F.R. §365.507(f) that ties the 18-month provisional operating period to the last, most recent grant of provisional operating authority comports with FMCSA’s regulations governing safety reviews that are conducted during this 18-month provisional period. FMCSA is obligated to “conduct a compliance review on a Mexico-domiciled carrier *within 18 months* after the [agency] issues the carrier provisional operating authority under part 365.” 49 C.F.R. §385.103(e) (emphasis added). Where a carrier receives a satisfactory rating on such a compliance review, the regulations provide that the carrier nonetheless “will remain in provisional status and its on-highway performance will continue to be closely monitored *for the remainder of the 18-month provisional registration period.*” 49 C.F.R. §385.109(b) (emphasis added).

These regulations contemplate a continuous 18-month period of provisional operating authority.

Third, permitting FMCSA to grandfather in Mexico-domiciled carriers that operated under the previous program would subvert Congress's intent that any grant of operating authority first be tested through a valid pilot program that complies with 49 U.S.C. §31315(c). *See* 2007 Act, §6901(a). That a carrier operated several months under the 2007 pilot program is not the same as having that carrier operate for 18 continuous months under the new pilot program (which will, among other improvements, track hours worked and monitor safety violations in better ways than the terminated program (76 Fed. Reg. at 20811, 20814; 76 Fed. Reg. at 40433)).

E. FMCSA Did Not Demonstrate That Simultaneous And Comparable Authority Is Available To U.S. Motor Carriers

The 2007 Act only permits FMCSA to grant authority to Mexico-domiciled trucks to operate beyond the border zone if “simultaneous and comparable authority to operate within Mexico is made available to motor carriers domiciled in the United States.” 2007 Act, §6901(a)(3). FMCSA assumes that, so long as U.S. motor carriers “have the ability to apply for authority and operate within Mexico” in a manner “similar to that of Mexico-domiciled motor carriers in the

United States” (76 Fed. Reg. at 40431), it is of no moment if there are significant practical obstacles to U.S. carriers’ access to Mexican roadways. *Id.* (dismissing concerns about access as “independent business decision on the part of motor carriers as to whether or not they wish to . . . use [operating authority] once obtained”). Such a formalistic reading of the 2007 Act should be rejected. Congress’s intent that U.S. carriers receive comparable authority to operate within Mexico is not realized if it is infeasible for U.S. carriers to operate in Mexico.

U.S. motor carriers will not have comparable access to Mexico’s roadways because diesel engines manufactured in the U.S. in 2007 and later require the use of ultra-low sulfur diesel (“ULSD”) fuel. 66 Fed. Reg. 5002, 5006 (Jan. 18, 2001). FMCSA acknowledges that ULSD fuel currently is not available in all regions of Mexico. JA 443. Without ULSD fuel being available throughout Mexico, U.S. truckers would be forced to use higher sulfur fuels that can damage and defeat emissions control devices on their trucks’ engines and void engine warranties. *See* 66 Fed. Reg. at 5005, 5071; JA 417. As a report FMCSA cites recognizes, “[t]he availability of ULSD fuel in Mexico would allow modern U.S. trucks to operate in Mexico without damaging on-board emissions reduction technologies and compromising emissions warranties.” Strategy And Recommendations For U.S.-Mexico Border Diesel Emissions Reductions,” prepared for U.S. EPA Office of

International Affairs by Ross & Associates Environmental Consulting, Ltd., at 3 (July 2007), *available at* <http://www.unep.org/transport/pcf/PDF/dieselrecomm-Eng.pdf>), cited in JA 443 n.6.

Even assuming that ULSD fuel is available near the border and in large cities (76 Fed. Reg. at 40434), without more widespread availability, there is no evidence that U.S.-domiciled motor carriers will be able to operate within Mexico in the same way the U.S. has granted Mexico-domiciled trucks access to its roads. FMCSA violated the 2007 Act by failing to engage in a reasoned analysis of whether U.S. carriers will have comparable ability to operate within Mexico.

III. FMCSA DID NOT COMPLY WITH NEPA

There are three separate reasons why the pilot program does not comply with NEPA. First, FMCSA did not perform the NEPA analysis until after the agency had made the decision to proceed with the pilot program, when it was too late to take into account environmental concerns. Second, FMCSA, due to its misunderstanding of the law, did not take into account how its choices about safety would affect the environment. Third, FMCSA did not conduct the required examination of alternatives.

A. Statutory Background

Enacted in 1969, NEPA “authorizes and directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance” with the Act’s goals. 42 U.S.C.

§4332. Each federal agency must “interpret [NEPA] as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act’s national environmental objectives.” 40 C.F.R. §1500.6.

NEPA requires agencies to include in every proposal for a major federal action “significantly affecting the quality of the human environment” a detailed EIS addressing environmental effects, alternatives, and other factors. 42 U.S.C. §4332. In those instances where it is unclear whether there will be significant effects, agencies may first prepare an EA. 40 C.F.R. §1501.4. An EA is a more “concise . . . document” that “[b]riefly provide[s] sufficient evidence and analysis for determining whether” agency action is likely to have a significant environmental impact and thus requires an EIS, or whether a FONSI is warranted. 40 C.F.R. §1508.9(a). Accordingly, when preparing an EA, the agency must take a “hard look” at all “relevant areas of environmental concern” to assess whether there is the potential for significant environmental impact. *Sierra Club v. Peterson*, 717 F.2d at 1413.

An EA also serves to “[a]id an agency’s compliance” with statutory objectives even “when no environmental impact statement is necessary.” 40 C.F.R. §1508.9(a). For instance, the requirement that an EA take into account alternatives to an action “is independent of the question of environmental impact statements, and operative even if the agency finds no significant environmental impact.” *River Road Alliance, Inc. v. Corps of Engineers*, 764 F.2d 445, 452 (7th Cir. 1985).

B. FMCSA Violated NEPA By Deciding To Proceed With The Pilot Program Before Conducting The NEPA Analysis

“The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences.” 40 C.F.R. §1500.1(c). An agency’s “NEPA procedures must insure that environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken.” 40 C.F.R. §1500.1(b) (emphasis added); *see also* 40 C.F.R. §1501.4(b) (when preparing EA, agency must “involve environmental agencies, applicants, and the public, to the extent practicable”).

To this end, agencies must also “integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values.” 40 C.F.R. §1501.2. This Court has found that the

appropriate time for preparing an EIS is “*prior* to a decision, when the decisionmaker retains a maximum range of options.” *Sierra Club v. Peterson*, 717 F.2d at 1414; *see also* 40 C.F.R. §1502.5 (“An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing . . . a proposal The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.”). Because an agency that chooses to do an EA must then decide whether to prepare an EIS, the same timing requirements that apply to an EIS also apply to an EA. *See Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000) (“In terms of timing and importance to the goals of NEPA, we see no difference between an EA and an EIS in connection with when an EA must be integrated into the calculus.”); *Fund For Animals v. Norton*, 281 F.Supp.2d 209, 229 (D.D.C. 2003) (same).

FMCSA’s actions in this case do not comply with the law. FMCSA issued its DEA on July 6, 2011 (JA 246), three months *after* issuing the initial notice regarding the pilot program in April 2011 (76 Fed. Reg. at 20819), one week *after* issuing its final notice of intent to proceed with the pilot program on June 29, 2011 (76 Fed. Reg. at 40439), and the same day as entering into an agreement with the Mexican government setting forth several key terms of the pilot program (JA 370).

Comments were due on August 11, 2011. 76 Fed. Reg. at 40980. FMCSA did not make its FONSI or issue its FEA until late September 2011 (JA 421, 474) – three months after the agency had made its final decision to proceed with the pilot program.

Given this timing, FMCSA did not consider the environmental consequences of the pilot program *before* it made its decisions; nor did the agency properly involve the public in the environmental review process, as the DEA was not even available until after the agency had made the decision to proceed with the pilot program. The sum of the matter is that FMCSA employed a schedule that flagrantly disregarded the requirements of NEPA.

FMCSA defends its actions on two bases, both inadequate. First, the agency insists that notwithstanding that it decided to move forward with the pilot program before issuing its DEA, it still had the opportunity to make “certain changes to *limited* aspects of the pilot program, specifically aspects related to FMCSA inspection procedures, if needed.” JA 436 (emphasis added). This claim contains its own refutation. As noted above, FMCSA issued its final decision committing to the heart of the pilot program before issuing the DEA. After this point in time, by FMCSA’s own admission, the agency retained discretion only to make “limited” changes. *Id.* The environmental analyses NEPA requires must be

conducted at a point in time when significant decisions can still be altered as a result, not just when tinkering with a few details remains possible. *See, e.g., Center for Environmental Law and Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1006 (9th Cir. 2011) (“To avoid post hoc agency rationalizations, proper timing is one of NEPA’s central themes. The agency must complete an EA before the ‘go-no go’ stage of a project.”) (internal citations, quotation marks, and alterations omitted).

Second, FMCSA claims that to the extent the timing of its EA limited its ability to consider environmental consequences or public feedback in developing the other aspects of the pilot program, “it was necessary . . . to clarify the substantive details of the proposed pilot program before it could accurately analyze the potential environmental effects of the program.” JA 436. But the purpose of NEPA is not for an agency simply to state the environmental consequences of its proposed action, but for its understanding of any such consequences to actually shape the actions taken. NEPA’s procedures are intended to be “action-forcing.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). “[B]y focusing the agency’s attention on the environmental consequences of a proposed project, NEPA ensures that important

effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” *Id.*

C. FMCSA Violated NEPA By Failing To Consider Anything Other Than Inspection Impacts Of The Pilot Program

The scope of a NEPA analysis refers to the “range of actions, alternatives, and impacts” that an agency must consider to fulfill the statutory mandate. 40 C.F.R. §1508.25. Here, FMCSA addressed only the “[e]nvironmental and safety impacts associated with the *inspection* of vehicles and pre-screening of motor carriers.” JA 433 (emphasis added). The agency refused to consider an entire category of environmental impacts – the host of effects that flow from the agency’s decisions about how to structure the pilot program, including its choices regarding who participates in the program and the regulatory standards applicable to participants. This category of effects that FMCSA simply excluded from consideration are likely to have more significant impacts than the limited subset of impacts identified in the EA.

FMCSA erroneously insists that *Public Citizen* compels its constrained approach. *Public Citizen* held that even though FMCSA’s issuance of certain regulations was at that time a precursor to the entry of Mexico-domiciled trucks into the United States, FMCSA was not “responsible under NEPA” for assessing

the effects of those trucks' entry because the "legally relevant cause of the entry of the Mexican trucks" was "not FMCSA's action" in issuing the regulations, but "the actions of the President . . . [and] Congress." 541 U.S. at 768-69. The Court explained that, where an agency has "no ability to prevent a certain effect due to its limited statutory authority over the relevant actions," "the agency need not consider these effects in its EA." *Id.* at 770. Thus, FMCSA did not need to evaluate the effects of increased "cross-border operations of Mexican motor carriers," because the agency had not caused those increased operations. *Id.* at 763, 769.

FMCSA contends that its "discretion to prevent cross-border operations of long-haul Mexico-domiciled motor carriers" is no greater here than it was in *Public Citizen*. JA 433-34. Just as before, the agency claims, it has no authority to prevent trucks from entering this country, and thus need not consider their effects. *Id.* On this basis, FMCSA argues that only the "[e]nvironmental and safety impacts associated with the inspection of vehicles and pre-screening of motor carriers" at the border – the only impacts over which FMCSA admits it has authority and thus is the legally relevant cause – "are the proper focus of FMCSA's environmental review under NEPA as construed by *Public Citizen*." JA 433.

FMCSA's justification misses the point entirely. Regardless of whether FMCSA is the cause of Mexico-domiciled trucks' entry into the country such that the agency must take into account the impacts arising solely from the trucks' *mere presence* in the United States, FMCSA certainly must account for the separate and distinct impacts of *FMCSA's own choices* in designing the pilot program.

Although Congress required FMCSA first to test the grant of long-haul operating authority to Mexico-domiciled trucks through a pilot program, FMCSA retains broad discretion as to how to formulate that program. As proof, one need only look at the substantial changes the agency made from the 2007 program to the current pilot program. *Compare, e.g.*, 72 Fed. Reg. at 23884 (2007 program "has a one-year limit") *with* 76 Fed. Reg. at 20810 (current "pilot program will not exceed 3 years"); *and* 72 Fed. Reg. at 23884 (2007 program "will allow up to 100 Mexico-domiciled motor carriers to operate beyond the border commercial zones") *with* 76 Fed. Reg. at 20818 ("A lower number of carriers will be needed in this program [than in 2007]."); *see also, e.g.*, 76 Fed. Reg. at 20810 (providing for stages, unlike in 2007); *id.* at 20811 (providing for compliance with emissions regulations, unlike in 2007); *id.* (providing that each vehicle approved for use will be equipped with an electronic monitoring device, unlike in 2007).

There are any number of choices that FMCSA made or could have made in designing the pilot program that affect the environment. For example, FMCSA had to decide what engine model year's safety standards trucks manufactured in Mexico would have to meet if they did not comply with the certification requirement for U.S. trucks, and the agency chose trucks of model year 1996 and later. 76 Fed. Reg. at 20811. FMCSA did not analyze the environmental effects of choosing a 1996 cut-off instead of a more recent date. *See* JA 415.

Additionally, FMCSA could have considered limiting entry at the border to a few places where it could do more enhanced inspections; further, in choosing which points of entry would be available, FMCSA could have mitigated the environmental justice implications for the disproportionately minority and low-income populations in the areas where pilot program participants are likely to travel. *See* JA 282, 418-19.

Public Citizen does not end FMCSA's responsibility to examine the effects of its own actions. To the contrary, the Supreme Court explicitly noted that it was *not* addressing any challenge to the EA based on FMCSA's failure to consider the impacts of the challenged regulations, or possible alternatives to those regulations. 541 U.S. at 764. Indeed, FMCSA had already in that case "appropriately and reasonably examined the incremental impact of its safety rules." *Id.* at 770.

FMCSA refuses to do here what it freely admitted it must do, *and did do*, in *Public Citizen* – consider the environmental impacts of its own regulatory choices.

The failure to consider the non-inspection impacts of the pilot program based on FMCSA’s incorrect legal conclusion that *Public Citizen* mandates this result requires the agency to conduct a new NEPA analysis. *See, e.g., Johnson v. Office of Thrift Supervision*, 81 F.3d 195, 201 (D.C. Cir. 1996) (agency action cannot be upheld if based on “error of law”).

D. FMCSA Violated NEPA By Failing To Consider Alternatives

The alternatives section is “the heart” of a NEPA document. 40 C.F.R. §1502.14. Through presenting “the environmental impacts of the proposal” along with the impacts of the proposal’s “alternatives in comparative form,” the agency “sharply defin[es] the issues and provid[es] a clear basis for choice among options by the decisionmaker and the public.” *Id.* NEPA regulations *require* that an agency consider, at minimum: (1) a no action alternative; (2) any other reasonable courses of action; and (3) any mitigation measures not in the proposed action. 40 C.F.R. §1508.25. An alternative is reasonable under NEPA if it is “technically and economically practical and feasible and meet[s] the purpose and need of the proposed action.” *Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 72 (D.C. Cir. 2011).

FMCSA disregards these requirements, examining only a “no-action” alternative (JA 442), and refusing to include any other alternatives or mitigation strategies (JA 440-44) – even those Petitioners and others explicitly proposed in response to the DEA’s inadequacies. JA 436-38. These alternatives were reasonable and had the potential to mitigate the pilot program’s environmental impacts. FMCSA’s failure to examine even one alternative constitutes a violation of the statute (and reflects the lack of attention the agency gave to NEPA during the entire process).

First, Petitioners suggested FMCSA consider requiring pilot program participants to use vehicles adhering to more recent FMVSSs than 1996. JA 415. A later date would affect the environment in at least two ways. Petitioners noted that U.S. emissions standards for 2004-2006 are much more stringent than Mexican standards for those years. JA 416. Thus, requiring pilot program participants using trucks built in Mexico to meet, for example, 2006 instead of 1996 safety standards would have positive environmental effects.

In addition, a critical reason for federal safety standards is protecting against crashes. *See, e.g.*, 49 C.F.R. §571.301, S2 (“The purpose of this standard is to reduce deaths and injuries occurring from fires that result from fuel spillage during and after motor vehicle crashes.”). As safety standards improve, crashes are less

likely. In turn, as FMCSA recognizes, “reducing CMV crashes reduces impacts to the environment.” JA 457. Thus, FMCSA’s safety-related choices affect the environment.

By using 1996 FMVSSs as the cut-off for trucks manufactured in Mexico, FMCSA does not require compliance with later safety advances. For instance, it was not until after 1996 that trucks were required to use antilock braking systems. *See* 49 C.F.R. §571.121 (requiring truck tractors manufactured after March 1, 1997, and single unit trucks manufactured after March 1, 1998, that use air brake systems to be equipped with an antilock brake system); 49 C.F.R. §571.105, 60 Fed. Reg. 63965 (Dec. 13, 1995) (requiring trucks manufactured after March 1, 1999 that use hydraulic brake systems to be equipped with an antilock brake system). Use of antilock braking systems is estimated to “help prevent between 320 and 506 fatalities, between 15,900 and 27,413 injuries, and between \$458 million and \$553 million of property damage each year.” 60 Fed. Reg. 13216, 13253 (Mar. 10, 1995). FMCSA provides no information about its choice of 1996 as the cut-off, when 1997, 1998, or 1999 would include antilock braking systems that would prevent crashes and therefore mitigate environmental effects.

Likewise, Petitioners suggested that FMCSA examine whether the pilot program’s waiver of the FMVSSs certification requirement is likely to affect

public safety and the environment. JA 416. Because only *most* 1996 and later trucks manufactured in Mexico meet the FMVSSs (JA 304), the failure to ensure strict compliance with the labeling requirement set forth in 49 U.S.C. §§30112 and 30115 means that safety will be compromised.

These possible alternatives related to compliance with FMVSSs are plainly reasonable under NEPA. Choosing a date later than 1996 is feasible, simple, economical, and would require only slight changes to the overall structure of the pilot program. A later date would improve not only environmental outcomes, but safety ones as well, consistent with the goals of the pilot program. *See Theodore Roosevelt Conservation Partnership*, 661 F.3d at 72 (“An alternative is reasonable if it is objectively feasible as well as reasonable in light of [the agency’s] objectives.”) (internal quotation marks omitted).

Nonetheless, FMCSA stated that the suggestion was inappropriate for consideration in an EA because it concerned safety rather than environmental impacts. JA 438. FMCSA’s argument is inconsistent with the broad definition of “environmental effects” an agency is required to consider under NEPA, effects that may include economic, social, and health impacts, as well as ecological impacts. 40 C.F.R. §1508.8; *see also* 40 C.F.R. §1508.14 (“Human environment shall be interpreted comprehensively to include the natural and physical

environment and the relationship of people with that environment.”). The argument is also inconsistent with FMCSA’s own acknowledgment that safety measures have environmental impacts. *See* JA 457.

A second category of alternatives proposed included requiring pilot program participants to adhere to more stringent environmental regulations. JA 410-11, 415-17. For example, the pilot program requires that participants use vehicles displaying an emissions control label indicating conformity with U.S. Environmental Protection Agency regulations applicable to 1998 or later engines, or present documentation from the engine manufacturer establishing the same. 76 Fed. Reg. at 20811. Commenters suggested alternatives such as requiring vehicles to comply with more recent and more stringent emissions standards. JA 410-11.

Additionally, the pilot program as proposed (and adopted) by FMCSA does not regulate what kind of fuel participants’ vehicles must use, notwithstanding that Mexico-domiciled trucks are permitted to use more polluting fuel than modern U.S. trucks (which must use ULSD fuel). JA 402, 417. Commenters suggested that, given that the less polluting fuel is not widely available in Mexico, FMCSA could take steps to ensure that pilot program participants use the less polluting fuel while operating in the United States. JA 411, 415.

FMCSA refused to consider these alternatives for two interrelated reasons. First, the agency claimed that because it did not have the authority to regulate environmental standards directly for pilot program participants, it need not consider alternatives involving imposition of such standards. JA 435. Although the agency admitted having “broad authority over the regulation of motor carrier safety,” it insisted that “its regulatory authority does not extend beyond that sphere into areas such as the imposition or enforcement of, for example, vehicle emissions standards.” *Id.* Second, anticipating the question of how the agency had included emissions standards in the pilot program, FMCSA asserted that these standards existed only because “the Mexican Government has consented to them,” but that the agency on its own could not “unilaterally decide[] to bar trucks from the pilot program on environmental grounds.” *Id.*

Even assuming that FMCSA is correct in its claim that it does not have authority unilaterally to impose environmental conditions, that authority is not the measure of what *alternatives* an agency must consider under NEPA. FMCSA’s contention to the contrary is legal error. In explaining its refusal to consider alternatives that it could not have imposed, FMCSA relies again on *Public Citizen*. *Id.* That case, however, stated only that “where an agency has no ability to prevent a certain *effect* due to its limited statutory authority over the relevant actions . . .

the agency need not consider [that] *effect*[]" in its EA. 541 U.S. at 770 (emphases added). In other words, *Public Citizen* addressed effects, not alternatives. *Id.* at 764-65 (“What is not . . . before us . . . is any challenge to the EA due to its failure properly to consider possible alternatives to the proposed action.”).

Under NEPA, an agency must “include reasonable *alternatives not within [its] jurisdiction*” in an EA. 40 C.F.R. §1502.14 (emphasis added). Courts regularly find environmental documents insufficient under NEPA because of their failure to consider alternatives outside of the agency’s jurisdiction. *See, e.g., NRDC v. Morton*, 458 F.2d 827, 834-35 (D.C. Cir. 1972); *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 814 (9th Cir. 1999). Thus, even were FMSCA correct that it has no discretion to impose environmental standards, the agency was nonetheless required to consider reasonable alternatives regarding environmental regulation in its EA. Indeed, given that the agency actually *did* negotiate over environmental standards and reach agreement with the Mexican government, the agency should not now be heard to claim that it need not consider alternatives or provide information about them to the public.

IV. THE PILOT PROGRAM SHOULD BE SET ASIDE OR ENJOINED

Under the APA, the Court sets aside agency action that is arbitrary, capricious, or otherwise contrary to law. 5 U.S.C. §706(2)(A). FMCSA's failure to meet congressional safety standards requires that the pilot program be set aside.

Further, "an injunction is the most common judicial response to a NEPA violation. . . . The purpose of enjoining government action pending preparation of [the requisite environmental analysis] is, generally, to maintain the status quo while additional environmental data is obtained, in order to preserve the decision makers' opportunity to choose among policy alternatives." *Forelaws on Board v. Johnson*, 743 F.2d 677, 685 (9th Cir. 1984) (citing *State of Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978) and F. Grad, *Treatise on Environmental Law*, §9.03(b) (1980)); *see also Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 147 (D.C. Cir. 1985). Additionally, FMCSA cannot simply rubber stamp the decision that it previously reached, but should fully assess anew all impacts and alternatives of this action before restarting the pilot program. *Cf. Metcalf*, 214 F.3d at 1146 (discussing remedy where timing of EA violated NEPA).

CONCLUSION

For the foregoing reasons, the Court should find that FMCSA's pilot program violates the law, and should set aside the program and enjoin its further implementation until the violations are remedied.

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Respectfully submitted,

STEPHEN P. BERZON
JONATHAN WEISSGLASS
BARBARA J. CHISHOLM
DIANA S. REDDY
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151

Attorneys for All Petitioners

SCOTT L. NELSON
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
Telephone: (202) 588-1000

Attorney for Petitioner Public Citizen

By: /s/ Stephen P. Berzon
/s/ Jonathan Weissglass

Stephen P. Berzon
Jonathan Weissglass

CERTIFICATE OF COMPLIANCE

I certify that the opening brief is proportionately spaced in Times New Roman font, 14 point type, and, according to the word count provided in Word Perfect, contains 13,995 words.

Dated: December 21, 2011

/s/ Stephen P. Berzon

/s/ Jonathan Weissglass

Stephen P. Berzon

Jonathan Weissglass

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2011, I filed and served the foregoing brief by causing a copy to be electronically filed and served via the appellate CM/ECF system to Respondents' following counsel of record:

Michael S. Raab
michael.raab@usdoj.gov
Michael P. Abate
michael.abate@usdoj.gov
United States Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W.
Room 7226
Washington, D.C. 20530

Dated: December 21, 2011

/s/ Stephen P. Berzon
/s/ Jonathan Weissglass

Stephen P. Berzon
Jonathan Weissglass